Supreme Court, U.S.
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No. 06-414

IN THE

Supreme Court of the United States

NARRAGANSETT INDIAN TRIBE,
Petitioner,

v.

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF

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REPLY BRIEF

The First Circuit correctly saw this case as presenting, on undisputed facts, a pure question of law: whether Congress abrogates tribal sovereign immunity by simply extending state law and jurisdiction over Indian lands. As we showed in our petition, the First Circuit resolved that question in direct conflict with every other case to consider it. Despite its best efforts, the State is unable to obscure the direct conflict between the decision below and the abundant case law construing Public Law 280 and similar federal statutes.

1. The failure of the State's effort is demonstrated by the issues it does *not* contest, which effectively concede the need for review by this Court.

First, the State makes no effort to defend the en banc court's rejection of the fundamental distinction between whether a law *applies* to a Tribe and whether that law may be *enforced* against the Tribe. Pet. App. 13a-14a. The First Circuit's determination that the Rhode Island Indian Claims Settlement Act abrogated tribal sovereign immunity depends entirely on its rejection of this basic principle. As noted in the petition (and emphasized in the dissent below), the First Circuit's holding on this issue cannot be reconciled with this Court's decisions in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998), and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 513-14 (1991). *See* Pet. at 13, 20-22; Pet. App. 28a-31a. Furthermore, the holding below squarely conflicts with decisions of the Second and Eleventh Circuits. Pet. at 21. All of these precedents hold that the application of state or federal substantive laws to conduct by a Tribe does not abrogate the Tribe's sovereign immunity – just as applying federal substantive laws to a State does not abrogate the State's sovereign immunity. *See id.* at 13, 20-22. This conflict,

standing alone, supplies an ample basis for granting the petition.

Second, the State does not challenge this Court's precedents holding that tribal sovereign immunity survived Public Law 280's extension of state law and jurisdiction over Indian lands because Public Law 280 (as well as its legislative history) is silent as to sovereign immunity. *See* Opp. at 9.

Third, the State concedes that the Rhode Island settlement is likewise silent as to sovereign immunity: Nothing in the text of the Settlement Act or the Settlement Agreement (or in their respective legislative or negotiating histories) expressly addresses – or even mentions – tribal sovereign immunity. *See* Pet. at 6, 19, 24, 29. Like the First Circuit, the State contends that the statutory text abrogates the Tribe's immunity *impliedly* – despite the wealth of case law in the context of tribal, state, and federal immunity that such an abrogation "'cannot be implied,'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (citation omitted), and despite the holdings in *Bryan v. Itasca County*, 426 U.S. 373, 385-90 (1976), and *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890-92 (1986), that language bestowing "jurisdiction" and providing that state law is in "force and effect" does not constitute such an abrogation.

Fourth, although the State struggles (unsuccessfully, as we show below) to distinguish Public Law 280 – which this Court has determined "represents the primary expression of federal policy governing the assumption by States of civil and criminal jurisdiction over the Indian Nations," *Three Affiliated Tribes*, 476 U.S. at 884 – the State entirely ignores the multitude of other land-claims settlement statutes and federal-recognition acts cited in the petition. *Compare* Pet. at 13, 15-16, 18-19, 25-26 (discussing nearly a dozen federal statutes) *with* Opp. at 6 (addressing only "a single

congressional enactment – Public Law 280") *and* Opp. at 9 (addressing "only a single federal statute"). The State never even mentions the cases interpreting those other federal statutes, including *Silva v. Ysleta del Sur Pueblo*, 28 S.W.3d 122, 124-25 (Tex. App.-El Paso 2000), and *Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 507-08 (Ariz. Ct. App. 1985), both of which are in direct conflict with the First Circuit's decision, and one of which (*Val/Del*) was previously cited by this Court as part of a split that justified review. *See C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 417 (2001) (invoking *Val/Del*); *see also* Pet. at 18-19. Nor does the State seek to square the First Circuit's decision here with the Maine Indian Claims Settlement Act, which shows that Congress knew how to abrogate tribal immunity when it wanted to. *See* Pet. at 29-30.

Fifth, the State does not dispute (because it cannot) that the First Circuit's decision is literally unprecedented. There is simply *no case* holding that statutory language remotely like the language in the Rhode Island Settlement Act abrogates the sovereign immunity of a Tribe or any other government. Review is thus manifestly appropriate.

2. The arguments the State puts forward to avoid certiorari are unpersuasive. Although the case was decided on cross-motions for summary judgment, the State invokes a series of purported factual "disputes" that it claims preclude this Court from addressing the pure issue of law that the First Circuit addressed. These belatedly raised "disputes" are, however, illusory or irrelevant.

The State's principal factual contention is that "no enforcement activities were directed either at the Tribe or the Tribal government" and that it is disputed whether the Tribe owned the items seized by the State. Opp. at 18; *see id.* at 2, 17-18. Specifically, the State contends – for the first time and without citation to any record evidence – that it has

seized documents "indicat[ing]" that the "cigarettes were not owned by the Narragansetts but, rather, by an out-of-state Indian tribe." *Id.* at 17 n.15; *see id.* at 2 n.2, 5 n.8. The State's contention is answered by the opening paragraph of the en banc decision, which makes clear the ground on which the First Circuit decided the case. The "challenging question" that the First Circuit decided was: "May officers of the State, acting pursuant to an otherwise valid search warrant, enter upon tribal lands and seize contraband *(in this case, unstamped, untaxed cigarettes) owned by the Tribe* and held by it for sale to the general public?" Pet. App. 2a (emphasis added). Indeed, it is no surprise that the First Circuit framed the argument that way. At every step of this litigation, the Tribe repeatedly and without objection from the State noted that it was challenging the State's seizure of "tribal government property."[1] And the State's own search warrant listed "Matthew Thomas[,] Chief of the Narragansett Indians," as the "owner or keeper" of the property to be searched. Pet. App. 151a. At no point prior to the opposition in this Court did the State even suggest that the Tribe did not own the seized items.

Moreover, even if the ownership of the cigarettes could legitimately be disputed for the first time at this late date – which it cannot be – that still would provide no reason for denying the petition. *First*, it remains undisputed that, aside

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[1] *See, e.g.*, Corrected Principal Br. for the Appellant Narragansett Indian Tribe, No. 04-1155, at 2 (1st Cir. filed Apr. 9, 2004) (listing as the first issue presented whether the State acted lawfully "when it enforced criminal provisions of a State statute on the sovereign government of the Narragansett Indian Tribe . . . by executing a search warrant on the Chief Sachem of the Tribe on Tribal lands *for Tribal property*" (emphasis added)); Supplemental En Banc Br. for Narragansett Indian Tribe Appellant, No. 04-1155, at 16 (1st Cir. filed Sept. 14, 2005) (noting that nothing the State cites "authorize[s] State officers to search or seize Tribal government property (including that of official Tribal businesses)").

from the cigarettes, all the other property seized from the Tribe – including the documents and the smoke shop's funds – are tribally owned.[2] *Second*, the District Court granted the State summary judgment, so any disputed material fact must be resolved in favor of the nonmovant, the Tribe.

The State's related contention that there is no evidence of the Tribe's ownership of the smoke shop (Opp. at 2, 17-18) is demonstrably wrong. The affidavit submitted below by Chief Sachem Thomas states unambiguously that the "Narragansett Smoke Shop is a *Tribal economic enterprise, established and operated by the Tribal government* under the laws of the Narragansett Indian Tribe" to "finance . . . governmental services." Pet. App. 156a (emphasis added).

The State also purports to contest whether the Tribe's lands are properly "Indian country" or constitute a "reservation." Opp. at 1 & n.1, 18. But that is beside the point. The only relevant points are ones the State does not contest: *first*, that the Tribe is a federally recognized Tribe under the superintendence of the United States that is thereby "entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States," 25 C.F.R. § 83.2; and *second*, that the Tribe's settlement lands, where the smoke shop is located, are trust lands. *See* Opp. at 2 n.1. On trust lands, a State has no jurisdiction to enforce its laws against a federally recognized Tribe unless Congress unequivocally provides it, a point (again) that the State does not contest. *See, e.g.*, *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-26 (1993); *Citizen Band Potawatomi*, 498 U.S. at 511 (citing

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[2] Nor was the seizure of those items unexpected or incidental: The warrant authorized seizure of "United States Currency, paperwork, items, computers [and] documents," in addition to "[c]artons of cigarettes." Pet. App. 151a.

United States v. John, 437 U.S. 634, 648-49 (1978)).[3] Thus, the issue presented in the petition – whether the First Circuit correctly held that Congress had so provided – is squarely joined.[4]

3. The State next labors to show that there is no conflict between the decision below and decisions (such as *Bryan* and *Three Affiliated Tribes*) construing Public Law 280, suggesting that Public Law 280 and the Settlement Act "share few similarities." Opp. at 6. But in fact, the similarities are abundant and controlling.

First, the language of the two statutes is indistinguishable: Public Law 280 authorizes certain States to exercise civil and criminal jurisdiction over specified Indian lands "to the same extent that such State has jurisdiction" elsewhere within the State, and provides that state civil and criminal laws "shall have the same force and effect" in Indian country as elsewhere in the State. 25 U.S.C. §§ 1321(a), 1322(a); 28 U.S.C. § 1360(a); *see* Pet. App. 31a-36a. The Settlement Act, which determines the extent of the State's jurisdiction here, *see Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423, 428-29 (1971), provides that the settlement lands "shall be subject to

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[3] The Settlement Act's provision discharging the United States of "further duties or liabilities . . . with respect to . . . the settlement lands," 25 U.S.C. § 1707(c), cited by the State (Opp. at 11), is irrelevant since the United States has recognized the Tribe and taken the settlement lands into trust, as the State concedes (*id.* at 2 n.1).

[4] Nothing in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), is to the contrary. There, the land in question was not trust land, but was instead owned in fee simple by a Native Village. *Id.* at 522-24. The land was neither restricted against alienation by federal law nor under the superintendence of the United States, *id.* at 532-33, and this Court expressly distinguished the land in *Venetie* from land "the Federal Government held . . . in trust for the benefit of Indians." *Id.* at 529 (citing *United States v. McGowan*, 302 U.S. 535, 537 (1938)).

the civil and criminal laws and jurisdiction of the State of Rhode Island," 25 U.S.C. § 1708(a); and the Settlement Agreement provides that "all laws of the State of Rhode Island shall be in full *force and effect* on the Settlement Lands," Pet. App. 142a (emphasis added). Most significantly, no language in either statute expressly confers state jurisdiction over the Tribes themselves (as distinguished from jurisdiction over individual Indians) or abrogates the Tribes' sovereign immunity.[5]

Second, the purpose of both statutes' relevant provisions is the same: to extend state law and jurisdiction over Indian lands. As this Court explained in *Three Affiliated Tribes*, while "[h]istorically, Indian territories were generally deemed beyond the legislative and judicial jurisdiction of the state governments," Public Law 280 "gave federal consent to the assumption of state civil and criminal jurisdiction over Indian country and provided the procedures by which such an assumption could be made." 476 U.S. at 879. The Settlement Act had precisely the same purpose, namely to subject the settlement lands to state civil and criminal laws and jurisdiction, as indeed the State concedes. Opp. at 7.

The State seeks to deflect attention from these controlling similarities by contending that the split described in the petition is not presented here because the cases cited by the Tribe involve Public Law 280's "narrow civil grant" rather than its grant of criminal jurisdiction. Opp. at 5, 13-14. That argument is flat wrong.

First, the Ninth Circuit squarely held in *California ex rel. California Department of Fish & Game v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979), that Public Law

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[5] Even if it were correct (which it is not), the State's contention that the Settlement Act grants it broader authority to impose local codes and state taxes on the settlement lands than Public Law 280 authorizes (*see* Opp. at 8-9 & n.9, 11-12) is irrelevant to whether Congress abrogated the Tribe's sovereign immunity.

280's grant of *criminal* jurisdiction does not abrogate tribal sovereign immunity, so the split is squarely presented even under the State's analysis. *Id.* at 1156.

Second, although *Bryan*, *Three Affiliated Tribes*, and *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165 (1977), are civil cases, the statutory language in Public Law 280's civil grant is virtually identical to the language used in that statute's grant of criminal jurisdiction, and thus affords no basis for the claimed distinction. *Compare* 25 U.S.C. § 1322(a) (civil) *with id.* § 1321(a) (criminal). Moreover, the cases interpreting Public Law 280 to leave tribal immunity unaffected turn both on the absence of any language expressly abrogating the Tribe's immunity and on this Court's numerous decisions holding that congressional waivers of sovereign immunity must be unequivocally expressed. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58; Pet. at 14, 28-29. Nothing in either the civil or the criminal provisions of Public Law 280 or in the Settlement Act contains the required language.[6] Indeed, no court has ever held that Public Law 280's grant of criminal jurisdiction abrogates tribal sovereign immunity.

The State next seeks to downplay the relationship between Public Law 280 and the Settlement Act by disparaging the former as a statute "[e]nacted more than 50 years ago." Opp. at 4. But the State does not dispute that this Court in *Bryan* provided a definitive interpretation of

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[6] The State asserts that the Settlement Act's language, providing that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State," somehow gives the State *both* a "right" to apply its laws there *and* a "remedy" against the Tribe on the settlement lands. Opp. at 7. That assertion ignores the fact that Public Law 280, like the Settlement Act, also authorizes States both to assume jurisdiction and to apply state criminal laws to Indian lands, yet has never been interpreted as giving States a "remedy" against Tribes themselves. *See* 25 U.S.C. § 1321(a); *see also* Pet. at 22-23.

Public Law 280 just two years before Congress passed the Settlement Act. As noted in the petition, Congress' inclusion in the Settlement Act of language indistinguishable from that in Public Law 280 was thus no mere coincidence. Pet. at 4-6, 24.[7]

4. The State's remaining arguments are make-weight. The State, for example, chides the Tribe for not citing *Nevada v. Hicks*, 533 U.S. 353 (2001). *See* Opp. at 14-15. But *Hicks* is not on point. *Hicks* involved a warrant executed against property of *an individual Indian* for his conduct *off* tribal lands; by contrast, this case involves a warrant executed against the property *of the Tribe*, arising out of the operation of the Tribe's government *on* the Tribe's lands. As such, the sovereign immunity of the Tribe – the issue here – was not presented in *Hicks*. *See* Pet. App. 39a n.15.

Similarly unavailing is the suggestion that the State had independent state-statutory authority to seize the cigarettes without a warrant. Opp. at 5, 16-17. Of course, even if true, that would not preclude review here because the statute says nothing about seizing the Tribe's currency and documents. Indeed, the State's decision to obtain a warrant reflects that reality. Moreover, the Tribe's argument is that sovereign immunity – an aspect of federal law – precludes a State from enforcing its law directly against a Tribe. Just as a State could not overcome the immunity of the United States by passing a statute authorizing the seizure of federal property, a State may not (in the absence of congressional authorization) overcome the Tribe's immunity as a matter of federal law by enacting a statute that bypasses state judicial procedures from which the Tribe is immune. Indeed, allowing States to

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[7] The State also suggests that Public Law 280 is only "applicable in a handful of western states with sprawling, populated reservations." Opp. at 4. As noted in the petition, however, Public Law 280 was seminal legislation that applies to hundreds of Tribes – large and small – in 11 States, spread across four federal judicial circuits. Pet. at 26 & n.8.

authorize seizures of tribal property by statute would eviscerate the Court's statements in *Citizen Band Potawatomi* and *Kiowa Tribe* that sovereign immunity provides a meaningful limit on the remedies available to States. Pet. at 14-15, 20-21, 30. It is thus no surprise that the majority below refused to invoke the state statute, and the dissent soundly rejected the State's effort to rely on it. Pet. App. 51a n.20.

Finally, the State makes a perfunctory stab at suggesting that the issue presented is not important. The State suggests, for example, that the Settlement Act was not the model for all the Eastern land-claims statutes. Opp. at 3. But it was *Congress itself* that characterized the Rhode Island Act as seminal. *See* Pet. at 25 (quoting the House Report). And the State does not contest that numerous land-claims acts (cited in the petition) in fact followed the form of the Rhode Island Act. *See* Pet. at 13, 15-16. Indeed, the First Circuit itself has recognized the role of the Rhode Island Act in this regard. *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994).

In the end, the State is forced to grudgingly concede that the enforcement of a state search warrant against a tribal government "may be . . . a critically important issue in Indian country." Opp. at 18. The issue is indeed critically important, and the Court granted certiorari four years ago to consider the issue but decided that case on other grounds. Pet. at 14, 28; *see also id.* at 25-28. Because this issue goes to the heart of tribal sovereignty, because the First Circuit's ruling could seriously destabilize tribal-state relations, and because the issue is of paramount importance throughout Indian country and will recur until resolved by this Court, this case merits review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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